No. 1227

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HUGH MADDEN and WILLIAM DONOHUE,

Appellants,

vs.

JENNIE C. McKENZIE,

Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the United States District Court for the District of Alaska, Third Division.

J. C. CAMPBELL,
W. H. METSON,
J. C. DREW,
JOHN S. McGINN,
IRA D. ORTON,
Attorneys for Appellee.

The James H. Barry Co.

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BRIEF FOR APPELLEE.

I.

THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION. THE ACTION AND JUDGMENT BEING LEGAL, NOT EQUITABLE, CAN ONLY BE REVIEWED BY WRIT OF ERROR.

The complaint in this action sets forth all the facts necessary in an action in ejectment. While it is true a mandatory injunction is prayed for, none was granted either provisionally or finally. And it may well be

doubted, if the facts stated in the complaint are all admitted to be true, whether in any view of the case plaintiff was entitled to such relief. The judgment in the action is simply that plaintiff is the owner of the leasehold estate and for restitution of the possession of the premises. (Tr., fols. 34-36.) No equitable relief whatever is granted by the judgment, and therefore it should be brought into this Court by writ of error and not by appeal. It is well settled that if an action at law is brought into this Court by appeal instead of by writ of error, it must be dismissed for want of jurisdiction.

Bevins vs. *Ramsay,* 11 How., 185.
Mussina vs. *Cavazos,* 6 Wall., 358.

II.

THE PLAINTIFF WAS ENTITLED TO JUDGMENT ON THE PLEADINGS.

It is admitted by the defendants in their answer that the written lease mentioned and set forth in plaintiffs' complaint was duly executed, and it is also admitted that on the 23d day of May, 1905, six days before plaintiff was dispossessed, plaintiff paid to defendants the rent of $200 one month in advance. (Tr., pp. 10 and 17.) It is further expressly admitted by defendants that up to the 28th day of May, being the day just before plaintiff was dispossessed, "that all the terms" of the lease were carried out by plaintiff. (Tr., p. 19.) This is

sufficient answer to the claim in appellants' brief that any issue was made by the denial in the answer of the performance by plaintiff of the terms of the lease. The answer then proceeds (Tr., pp. 19 and 20) to state the only alleged breach by plaintiff of the terms of the lease. These allegations are as follows (Tr. pp. 19 and 20):

"5. That all of the terms of said agreement were carried out upon the part of plaintiff and defendants until about the 28th day of May, A. D. 1905, when plaintiff, in violation of her agreement and said lease, without any notice or warning to defendants, moved all of the furniture of said premises, excepting about four rooms thereof, out of said premises so leased and occupied by her, and for the purpose of cheating and defrauding defendants, and hindering their said business, plaintiff then and there implored, advised and commanded the occupants of said premises to leave said premises and go with her to the rooming-house, dance-hall and saloon of Joe Ward, situate on Fourth and Cushman streets, Fairbanks, Alaska.

"6. Defendants further allege, that, thereafter, and on the 29th day of May, 1905, defendant Donohue notified plaintiff that she had violated her contract with defendants, and the letter and spirit of said contract and lease, and that the said Donohue, being then the owner of said lease, declared the same forfeited.

"7. Defendants further allege that thereafter, and on, to wit, the 29th day of May, A. D. 1905, the defend-

ant Donohue took possession of all of said premises peaceably, and while the said plaintiff was out of the possession of the same, and has ever since held possession thereof, and is now in possession of the same, and of all of said premises and occupying the same as a hotel and lodging-house."

We most respectfully submit that it is plain from these allegations that plaintiff was entitled on the pleadings to judgment for the recovery of the possession of the premises in question. The original lease, being for the period of one year with the right to renew for another like period, was within the statute of frauds.

Alaska Code Civil Procedure, secs. 1044 and 1046.
Carter's Alaska Codes, pp. 354, 355.

The precise point was determined by the Supreme Court of Michigan in *Hand* vs. *Osgood,* 107 Mich., 65; *64 N. W.,* 867. Also by the New York Supreme Court in *Rosen* vs. *Rose,* 13 Misc. Rep., 565; *S. C.,* 34 N. Y. Supp., 467.

Any attempted oral modification of the written lease was void. This, for two reasons: first, because the statute of frauds requiring such a contract to be in writing, it could not be modified by parol, and, independent of the statute of frauds, the contract having actually been reduced to writing, it could not afterwards be modified by parol.

If the Court has jurisdiction, it is respectfuly submitted that the judgment should be affirmed.

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